Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Section 1.17 of the	)	
Commission's Rules Concerning Truthful	)	GC Docket No. 02-37
Statements to the Commission	)	
	)	
Amendment of the Commission's Rules	)	
Pursuant to a Petition for Rulemaking	)	
Filed by James A. Kay, Jr.	)	

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Mobile Relay Associates ("MRA"), by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby submits its Opposition to the Petition for Reconsideration ("Recon Petition") filed April 28, 2003 herein by James A. Kay, Jr. ("Kay"). This Opposition is timely filed within fifteen days of publication of notice of the filing of the Recon Petition in the *Federal Register*. As discussed below, the Recon Petition is an attempt to intimidate the Commission's Enforcement Staff to enable Kay continue his flouting of Commission Rules with impunity, and to foreclose the ability of the Enforcement Bureau to perform its basic functions. Accordingly, it should be denied.

BACKGROUND

Kay was and is an unrepentant rulebreaker, who has never viewed himself as bound by any set of rules or regulations that apply to others. Virtually every SMR licensee in southern California was the subject of an investigation by the Commission's Enforcement Bureau during the 1990s, MRA included, but alone in the industry, Kay took the position that a Commission licensee has no obligation to obey Section 308 of the Communications Act of 1934 as amended ("Act"). So while his competitors, recognizing that holding a Commission license is a privilege and that one necessarily

agrees to respond to Commission inquiries as the *quid pro quo* for holding licenses, produced thousands of pages of documents at great expense in response to Section 308 inquiries, Kay simply told Commission personnel to effectively "drop dead." This history is recounted in *James A. Kay, Jr.*, 17 FCC Rcd. 1834 (2002) ("*Kay Decision*"), *recon. denied* 17 FCC Rcd. 8554 (2002).

Far from having been rehabilitated, Kay began using his local California counsel, Laurence Feinburg, as a front to hold licenses for Kay during the pendency of the Commission enforcement proceedings against Kay, and continues to employ Feinburg as a front man to this day.[1] Thus, Kay continues to have a motive to cripple the capability of the Enforcement Bureau to enforce rules against him, or to investigate him for rule violations.

Separately, Kay has begun a campaign of protesting every single application that MRA files, on "grounds" that do not make out a *prima facie* case of any rule violation, simply to harass MRA and to hamstring the processing of all MRA applications and thereby obtain an unfair competitive advantage over MRA. Such bad faith mass filings constitute an abuse of the Commission's processes.[2] So, again, Kay has substantial motive to cripple the ability of the Enforcement Bureau to perform its functions.

I. Regulatory Flexibility Analysis

Kay criticizes the Commission's determination that its new rule will not have a significant economic impact upon a substantial number of small entities. Recon Petition at pp.1-2. Patently, those few small entities that are recidivist rule breakers might incur significant additional costs to

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[1]Feinburg's FRN is 0004208534.

[2]Already, the sheer mass of Kay's filings has forced this Commission into multiple violations of the 90-day time deadline of Section 405 of the Act. *See, e.g.*, FCC file Nos. 0001028303, 0001018807, 0001028246, 0001027595, and 0001027579, where far more than ninety days has elapsed since the filing of reconsideration petitions by Kay against MRA.

evade Commission Rules, but the number of recidivist rulebreaker small entities is not "substantial", at least according to the record compiled in the rulemaking proceeding. The burden was on Kay to come forward with some statistical data if he desired a finding of a significant economic impact on a substantial number of small business entities, and Kay chose not to come forward with any such data, either prior to the Commission's decision or even in the body of the Recon Petition. Thus, Kay's challenge in this regard must fail.

II. Denial of Kay's Petition for Rulemaking

The Commission was correct to summarily reject Kay's petition for rulemaking, which puts forward proposed new rules that on their face are contrary to public policy and that would eliminate the ability of the Commission to enforce its rules or protect the integrity of its processes. For example, Kay proposed an enormous expansion of the *ex parte* rules to require the Commission's Enforcement Bureau to copy a target with any document it might receive in the initial stages of an investigation. This is equivalent to a requirement that a grand jury turn over to a target every document it receives in the course of investigating the target at the pre-indictment stage. Such a request is so ridiculous on its face that the Commission had no obligation to belabor the point.

As another example, Kay requested the Commission to amend a Congressional statute. Specifically, Kay requested that the Commission hold that a Commission licensee has no obligation to comply with a Commission request for information pursuant to Section 308 of the Act; that every Commission licensee can ignore requests for information made pursuant to that section of the statute, and that no Commission licensee has any obligation ever to produce anything except pursuant to subpoena. However, only Congress can amend Section 308 of the Act. Even if the Commission agreed with Kay from a policy standpoint, the most it could do would be to recommend to Congress

to amend the statute. Again, the Commission had no obligation to belabor the obvious.

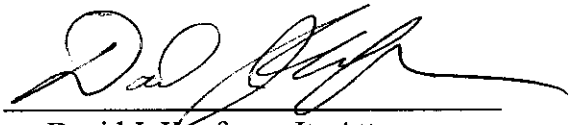
As still another example, Kay requests a rule change to require the enforcement staff to respond formally to each and every settlement proposal proffered by the target. (Kay ostensibly qualifies this new obligation by limiting it to "reasonable" settlement proposals, but this is no limitation at all, since the target is the judge of "reasonable".) No rule change is required to have the prosecuting staff respond to a truly reasonable proposal. The real impact of Kay's proposal would be to enable a crippling of Commission enforcement resources through a mountain of repetitive "settlement proffers." Such a proposal is also frivolous on its face.

MRA need not continue this exercise with respect to each and every one of Kay's other "proposals." Suffice it to say that all were equally frivolous, and the Commission devoted exactly the correct amount of explanation to them.

In summary, Kay's Recon Petition should be denied.

Respectfully submitted,
MOBILE RELAY ASSOCIATES

June 16, 2003

By: 
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CERTIFICATE OF SERVICE

I, Kristine Hensle, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, hereby certify that I have caused a copy of the foregoing "**OPPOSITION TO PETITION FOR RECONSIDERATION**" to be sent by first class mail, postage prepaid, this 16th day of June, 2003, to each of the following:

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